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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 67

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

BRIEF OPPOSING MOTION TO DISMISS ON GROUND OF MOOTNESS.

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Attorney for Petitioners.

CUMMINGS AND STANLEY,
JACK H. OPPENHEIM,
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The Schaffer Press, Inc. DEL. VIVI

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This cause, we submit, has not become moot. The reasons advanced by the Government for dismissal will be seen, upon analysis, to be untenable.

The Government, referring to Case No. 232 in the Emergency Court of Appeals, decided October 5, 1945,[1] says:

> Since petitioners have thus secured the relief which their petition for certiorari sought—a determination

[1] A petition for a writ of certiorari seeking review of that case here was filed on November 3, 1945, and is pending as No. 578 at the present term.

by the court below of the merits of certain objections to the pertinent price regulation—the present proceeding has lost its vitality and presents only a moot issue.

Again, the Government says:

> It follows, in our view, that a decision in the proceeding which has now reached judgment on the merits in the Emergency Court of Appeals would have afforded petitioners, if they were successful therein, all the relief which they might have obtained by a decision in the present proceeding.

These conclusions are faulty in view of the actual nature of the decision in Case No. 232 in the Emergency Court of Appeals. The decision (as we have already pointed out in the petition for certiorari, No. 578) is made to turn not simply upon the *merits* of the objection to the Regulation, but equally upon the question of the *timeliness* of that objection. Thus, it was said in the majority opinion in Case No. 232 that because petitioners had not filed a protest under Section 203(a) "during the time it was open to them by protest to question the validity of the regulation", they could not assert "that they were denied due process by failure of the Administrator to make a determination before they violated the regulation".[2]

As the matter now stands, the conclusion of the majority opinion under review in the present case—*i.e.*, that petitioners could obtain the same relief under Section 204(e)(1) as under Section 203(a), has been virtually reversed by the conclusion implicit in the decision in Case No. 232—*i.e.*, that a complaint under Section 204(e)(1) is not as meritorious as a protest under Section 203(a). The Emergency Court of Appeals apparently will not listen to due

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[2] Petitioners, it should be noted, have not been convicted of violating the Regulation.

process objections in a proceeding under Section 204(e)(1), when the objections, in its view, should have been raised at an earlier time in a proceeding under Section 203(a). (The basis for the distinction is not made explicit, and on its face would seem to be illogical.)

Now, the present proceeding originated in a protest filed under Section 203(a). If, as petitioners contend, the protest was properly filed under that section, then certainly *in this case* petitioners cannot be deprived of the right to "raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review". *Yakus* v. *United States*, 321 U. S. 414, 437.

The relief which petitioners seek in the present proceeding, if afforded them, will require the Emergency Court of Appeals to treat the protest filed by petitioners under Section 203(a) as properly filed, and to consider the due process objections to the Regulation which that court—(without justification)—said petitioners would not be heard to assert in Case No. 232.

Of course, we contend that the decision in the latter case is erroneous, and, in its construction of Section 204(e)(1), inconsistent with the same court's decision in the present case. Accordingly we are seeking its review on certiorari (No. 578) and its consolidation with the present case. To deal with the Emergency Court's decisions separately gives rise to unavoidably involved statements and introduces complexities of analysis which can be cut through by consolidating the cases and examining the underlying issues directly.

Some comment is called for by the arguments set forth in the Government's motion to dismiss:

The Government anticipates and seeks to refute "two possible arguments" against the conclusion that this case is moot. The first point anticipated is that there may be a latent jurisdictional defect in Case No. 232 in the Emergency Court of Appeals. In our brief heretofore filed herein, we suggested that the remedies provided by Sections 203(a) and 204(e)(1) are mutually exclusive, and that the latter remedy is intended by the Act to be made available only in cases where the former has—excusably—not been invoked. The fact is that petitioners *did* proceed under Section 203(a). It is only because the court below treated that proceeding as a nullity (as far as affects the question of the regulation's validity from July 16 to September 11, 1943) that petitioners then initiated a proceeding under Section 204(e)(1). The finding of the District Court that there was reasonable and substantial excuse for the petitioners' "failure to present such objection in a protest filed in accordance with Section 203(a)"—upon which the jurisdiction of the Emergency Court of Appeals rests in Case No. 232—obviously will lose all force if this Court decides that petitioners actually did "present such objection in a protest filed in accordance with Section 203(a)".

The District Court's finding, in which Case No. 232 is rooted, merely echoes the Emergency Court's pronouncement in the concluding paragraph of the decision under review in the present case, 148 F. (2d) at page 842. If the Emergency Court's construction of Section 203(a) was erroneous, can the District Court's finding nevertheless stand? That in itself in a question which, we submit, can be answered only by this Court's consideration of the two cases integrally. And if the District Court's finding is conclusive, can the Emergency Court disregard it—as it has done in the decision in Case No. 232—by holding in

effect that petitioners are *not excused* for their "failure to present such objection in a protest filed in accordance with Section 203(a)"?

The Government suggests as a reason for construing Sections 203(a) and 204(e)(1) as being *not* mutually exclusive, the fact that petitioners might have been forced to trial and possibly convicted of violation of the regulation while seeking determination of its validity by the procedure initiated under Section 203(a), which has no stay provisions such as were availed of under Section 204(e)(1). Under these circumstances, the Government says, petitioners "could have no relief against the sentence imposed". This is said to sanction the institution of the proceeding under Section 204(e)(1) notwithstanding the pendency of the protest under Section 203(a). Such a construction of the Act, we submit, is patently contrary to the legislative intent. In our view, the omission to provide for a stay of enforcement proceedings under Section 203(a) similar to the stay apparatus provided by Section 204(e)(1) is an inconsistency which cannot be resolved by such loose interpretation of Section 204(e)(1). Moreover, the construction of Section 203(a) suggested by the Government overlooks what this Court said in the *Yakus* case, 321 U. S. at page 447:

> Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. * * * Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds.

The "second possible argument against mootness" anticipated in the Government's motion to dismiss concerns the question whether a defendant in a criminal enforcement action, by filing a complaint under Section 204(e)(1), is adequately protected against a possible judgment and execution in a pending treble-damage action growing out of the same transactions covered by the indictment. In this connection, the Government construes Section 204(e)(2)(iii) as affording a stay of execution in the civil case until the final determination of the proceeding instituted under Section 204(e)(1). If such a construction of Section 204(e)(2)(iii) is upheld, then the Government's refutation of the "second possible argument against mootness" must be accepted. We cannot be certain, however, that such construction of Section 204(e)(2)(iii) is the proper one.

CONCLUSION.

It is submitted that in the light of the actual nature of the decision in Case No. 232 in the Emergency Court of Appeals, the present cause has not become moot.

Respectfully submitted,

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23, 50 U. S. C. App., Supp. III, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether under Section 203 (a) of the Emergency Price Control Act a protest may properly be filed against a maximum price regulation after the alleged ground of invalidity of the regulation has been removed by action of the Price Administrator.

2. Whether the construction of the Act by the Court below, as not permitting the filing of such a protest, has deprived petitioners of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra*, pp. 15–22. The maximum price regulation involved and pertinent amendment thereto appear in the Federal Register (7 F. R. 9732, 8 F. R. 12554).

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30 establishing specific maximum prices for various grades of wastepaper. So far as here relevant, the Reg-

ulation provided that unsorted wastepaper might not be sold to consumers thereof at a price higher than the maximum price prescribed for No. 1 mixed paper.[1]

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2 (j), the so-called Taft Amendment. Section 2 (j) provides that "Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; * * *." For the purpose of this proceeding it is conceded that Maximum Price Regulation No. 30 "standardizes" unsorted waste paper and therefore falls within the purview of Section 2 (j) (3) of the Act.

On September 11, 1943, the Administrator amended the preamble to Maximum Price Regulation No. 30 by adding the following sentence thereto:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has

[1] On December 28, 1943, the section involved was amended by Amendment No. 6 (8 F. R. 17483). The amendment made no change relevant to the instant case.

> determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

This amendment was made by Supplementary Order No. 64,[2] which was accompanied by a statement of the reasons involved in the issuance thereof (R. 35–41). At the same time the Administrator issued a supplementary statement of considerations involved in the issuance of Maximum Price Regulation No. 30 (R. 10–12).

On December 17, 1943, an indictment under Section 205 (b) of the Act was returned in the United States District Court for the Northern District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted wastepaper at more than the maximum price prescribed by the Regulation. On June 29, 1944, a civil action under Section 205 (a) and (e) of the Act was brought against petitioners by the Administrator in the same court, alleging similar violations. (R. 57, 64; see R. 8.)

On June 15, 1944, petitioners filed a protest against Section 1347.14 (d) of the Regulation pursuant to Section 203 (a) of the Emergency Price Control Act of 1942, as amended. (R. 1–9.) It was contended in the protest that Maximum

[2] 8 F. R. 12554.

Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14 (d) of the Regulation be declared to have been invalid between July 16, 1943 and September 11, 1943.

On June 30, 1944, the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) became effective, amending the Emergency Price Control Act. This act added to Section 204 of the Emergency Price Control Act a new subsection (e), *infra*, pp. 19–22, which provides (1) for a limited right of defendants in Section 205 proceedings to secure review of maximum price or rent regulations through a direct complaint to the Emergency Court of Appeals; and (2) for the stay or dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 17–31). Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204 (a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 50–54). The court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204 (a) of the

that period on account of the Administrator's failure to publish his determination that there was no practicable alternative, for the purposes of effective price control, to the standardization embodied in the Regulation. If petitioners had filed such a protest, they would also have been entitled, as of right, to a judicial determination of the question by the Emergency Court of Appeals, irrespective of any subsequent action by the Administrator. *Montgomery Ward & Co.* v. *Bowles*, 147 F. (2d) 858, 861 (E. C. A.). For their failure to assert this right, petitioners have no one to blame but themselves. As this Court observed in the *Yakus* case, "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (321 U. S. at p. 444.)

But here, unlike the situation presented in the *Yakus* case, petitioners are not absolutely barred from challenging the validity of the Regulation by reason of their failure to file a protest within the limited time available under the construction of the statute adopted by the court below. Petitioners may still avail themselves of the provisions of Section 204 (e) of the Act, added by the Stabilization Extension Act of 1944, in order to